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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 589

NATIONAL CITY LINES, INC., ET AL.,
*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, defendants-appellants in the court below, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in this cause on January 3, 1951.

## OPINION BELOW.

The opinion of the Court of Appeals (R. 2675) is not yet reported.

## JURISDICTION.

The judgments of the Court of Appeals became final upon the denial of rehearing on January 31, 1951 (R. 2713). This petition is filed within thirty days as allowed by law. 18 U. S. C. 3772; 327 U. S. 858. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

## QUESTIONS PRESENTED.

1. Whether the acquisition of ten-year requirements contracts covering one customer's purchases of petroleum products, tires and buses—regardless of how small that customer's purchases are in comparison to the total purchases of those products in any geographic area—constitutes, as a matter of law, the monopolization of "any part of the trade or commerce among the several states" within the meaning of Section 2 of the Sherman Act.

2. Whether such control of the business of a single customer can be considered *per se* a "monopolization" under Section 2 of the Sherman Act without consideration of the reasons for entering into the contracts which gave such control.

3. Whether the Court of Appeals, in a case which has been submitted to the jury under instructions from the trial court that a guilty verdict must be predicated upon a finding of an illegal "specific intent" can affirm such a verdict upon the theory that the actual intentions of the defendants were immaterial.

4. Whether, depending upon the answers to the foregoing questions, the trial court properly ruled upon offers of evidence by the defendants.

## STATUTE INVOLVED.

Section 2 of the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

## SUMMARY OF MATTER INVOLVED.

In order to simplify the questions presented by this petition, it may be assumed that several non-competing suppliers made investments in a common customer in exchange for individual ten-year requirements contracts. The principal issue is whether the suppliers and their customer thereby conspired to monopolize a part of commerce in violation of Section 2 of the Sherman Act, when, admittedly, there is neither allegation nor evidence that the customer's purchases represented a monopoly, or even a substantial percentage, of the total purchases of like products in any city, state or other geographic area.

## STATEMENT.

An indictment was returned on April 9, 1947, in the Southern District of California, charging the defendants with conspiring to restrain trade (Count I) and conspiring to monopolize (Count II) in violation of Sections 1 and 2 of the Sherman Act, respectively (R. 3). The cause was transferred to the Northern District of Illinois, and tried before Judge Campbell and a jury. The jury found the defendants not guilty on the first count and guilty on the second count (R. 2591). The court entered judgment on the verdict and assessed fines of $1.00 each against the individual defendants and larger fines against the corporate defendants (R. 1198-1199). The judgments were affirmed by the Court of Appeals (R. 2693-2703). Two of the individual defendants have paid their fines (R. 2673); all other defendants are petitioners here.

### The Defendants.

The City Lines defendants[1] own and operate local transit companies. The supplier defendants[2] sell products used by the City Lines. With respect to the products sold to the City Lines, there is no substantial competition between any two of the supplier defendants.[3]

1. National City Lines, Pacific City Lines, and E. Roy Fitzgerald and Foster G. Beamsley, officers of these corporations. American City Lines, originally named as a defendant, was dismissed on the ground that it had been merged into National City Lines (R. 19).

2. Firestone Tire & Rubber Company, General Motors Corporation, Phillips Petroleum Company, Standard Oil Company of California, Federal Engineering Corporation (a subsidiary of Standard), and L. R. Jackson, H. C. Grossman, and Henry C. Judd, officers of some of the above corporations.

3. The two oil companies market their products in different territories, Phillips in the Middle West and Standard on the Pacific

**The City Lines.**

In 1936, petitioner Roy Fitzgerald and his associates were operating local transit systems in seven cities, mostly in the Mid-West[4] (R. 431-458). At that time he had an opportunity to acquire seven old electric transit systems from a power company and to convert them to modern bus operations (R. 458-459). National City Lines was organized to finance these acquisitions and to take over the operation of the other Fitzgerald properties (R. 461). The financing of National took the form of a public sale of common and preferred stock (R. 461-462). It was expensive financing for National.[5]

National followed a policy of replacing the old streetcars with new buses, of revising routes in order to serve newly developed areas not accessible to the old trolley lines, and of modifying schedules to minimize congestion in the handling of passenger loads. It is undisputed that in every instance National was able substantially to improve service and in most cases to reduce the fares in existence at the time of the acquisition (R. 445-469; 585).

In 1938 and 1939 National had an opportunity to acquire additional streetcar systems and convert them to bus operations (R. 464-468). National did not have the funds necessary to acquire such properties, and public financing was not feasible at that time (R. 474, 1069). Consequently, National sought financing from its suppliers.

Over a period of several months petitioners Fitzgerald

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Coast (R. 883-884). Mack did not manufacture the small buses which were the principal bus equipment required by the City Lines, and did not, during the period involved in suit, build buses competitive to the small General Motor buses (R. 601).

4. The cities were: Galesburg, Joliet and East St. Louis, Illinois; Tulsa, Oklahoma; Montgomery, Alabama; Kalamazoo and Jackson, Michigan.

5. The aggregate amount of stock sold was $2,250,000. The financing costs were approximately $350,000 (R. 461-462).

and Beamsley, representing National, instituted negotiations with companies which marketed petroleum products, tires and buses.[6] Each supplier was approached separately and requested to make an investment in the company. In some cases requirements contracts were discussed in connection with the investment and in others they were not,[7] but it may be assumed for present purposes that the investment of each supplier was to be made in exchange for a requirements contract with National. Ultimately, at different times petitioners Firestone, Phillips, General Motors, and Mack each agreed to make an investment in National, and National agreed to buy its requirements of their respective products from them for a period of ten years.[8]

In each instance the contract between National and the supplier concerned was separately negotiated and separately consummated (R. 486, 495). No supplier at any time took any interest in the sales contract with any other supplier, although each knew that other suppliers were investing in the City Lines and entering into sales contracts (R. 791, 876-877, 1043, 1054). Furthermore, some of the details of the investments—such as whether the preferred stock should be registered under the Securities Act of 1933 or under the Act of 1934, and whether it should be listed on the New York Curb Exchange—were discussed between the suppliers (R. 646, 874-876, 903-905, 1233-

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6. Representatives of the following companies were approached in the following places: General Motors in Detroit (R. 479; 596-598; 784-785); Firestone in Chicago (R. 484; 1027-1032); the Texas Company in New York City (R. 477, 486, 611); Mack Manufacturing Corporation at Fitzgerald's Farm in McHenry, Illinois (R. 481, 591); B. F. Goodrich Company in Akron, Ohio (R. 482; 595, 604), and Phillips Petroleum Company in Bartlesville, Oklahoma (R. 492-494; 611; 613; 869-872; 932-933; 1228-1232).

7. See R. 595, 598, 870, 1028.

8. See R. 1275, 1266, 1277, 1284, 1329, 1331.

1236). These and similar facts relative to Pacific City Lines formed the basis for the finding of conspiracy.[9]

Pacific City Lines was a comparable West Coast development. It was financed in part by Standard Oil Company of California, Firestone and General Motors, which suppliers sold petroleum products, tires and buses to the Pacific City Lines operating companies. Although the differences in the formation, management and contractual obligations of Pacific and National were many and substantial, for the purposes of this petition defendants will accept the position of the Government that all of the City Lines operations should be regarded as a single enterprise.

It is important to note that no question of public injury is involved in this case. The Government has at no time contended that lower prices or better products could have been obtained by the City Lines from competitors of the supplier defendants.

**The Indictment.**

Count II of the indictment charged that beginning about January 1, 1937, the defendants continuously conspired "to monopolize part of the interstate trade and commerce

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9. The trial court stated (R. 1189):

"I am very frank to admit to counsel that after a very exhaustive review of the entire transcript in this case, and of the exhibits that were offered and received in evidence, that I might not have come to the same conclusion as the jury came to were I trying this case without a jury. That, however, is not the situation that confronts me."

The court held that the verdict of the jury was not contrary to the manifest weight of the evidence, "much as my own conclusions from the same evidence might have been different" (R. 1190). And the Court of Appeals treating the question of the sufficiency of the evidence as "the difficult crucial question," also held that, as a matter of law, the trial court was not under a duty to direct a verdict of not guilty (R. 2685). In order to limit the scope of this petition, however, defendants are not urging as a reason for granting certiorari that the evidence of conspiracy is insufficient.

of the United States, to-wit, that part consisting of the sale of motor buses, petroleum products, tires and tubes used by local transportation systems [controlled by the City Lines]", in violation of Section 2 of the Sherman Act (R. 13). Count II further alleged that the defendants "have done the things, which as hereinbefore alleged, they conspired to do" (R. 15), and that the conspiracy has had the specific effects which the charging paragraph alleged as the purpose of the conspiracy (R. 17). The defendants were found guilty of this charge (R. 2592).

Count I charged that the same facts constituted a violation of Section 1 of the Sherman Act (R. 8). All defendants were found not guilty of this charge (R. 2592).

**The Trial.**

The evidence offered by the Government to prove the monopolization alleged in the indictment consisted of the various requirements contracts, statistical exhibits showing the dollar volume of purchases by the City Lines from the supplier defendants, and testimony of a few representatives of other suppliers, such as the Sinclair Refining Company (R. 243), the Ford Motor Company (R. 393), and the B. F. Goodrich Company (R. 309, 402), to the effect that they had tried unsuccessfully to make sales to City Lines operating companies when the City Lines were under contract to buy their requirements of the particular products from the supplier defendants. Though in fact the volume of purchases was substantially less, it may be assumed for present purposes that the City Lines purchased 100% of their requirements of petroleum products, tires and buses from the supplier defendants while under contract to do so.

No evidence was offered by the Government to show the effect of the requirements contracts on the opportunities

of competitors of the supplier defendants to market their products generally. No evidence was offered by the Government which would have enabled the jury to compare the volume of purchases of petroleum products, tires and tubes, and motor buses by the City Lines with the total volume of purchases of like products in any area—even in the specific cities in which the City Lines subsidiaries operated. The record is silent as to the extent to which competitors had other customers for their products in these same areas. The theory of the Government was stated, in argument to the jury, as follows:

> "Taking these contracts on tires in their totality, they did monopolize this market. You cannot avoid that. The Firestone contracts with National and Pacific give Firestone a monopoly, a 100 per cent monopoly of the business of those companies. You cannot dispute that. 100 per cent is a monopoly. That is all there is to it" (R. 1153).

In accordance with this theory, the Government objected to every attempt by the defendants to show the effect of the requirements contracts on the opportunities of competitors to market their products. Evidence was offered by each of the supplier defendants to show that the volume of products sold to the City Lines represented only a negligible percentage of the total volume of sales of like products in any geographic area which could conceivably have been considered the relevant competitive market.[10] Evidence was offered to prove that while the contracts were in effect, the total sales of competitors of the defendants were substantially improving (R. 412). In each instance the Government's objection was sustained.

No evidence was offered by the Government to prove that any defendant had a "specific intent" to injure its competitors, or that any of the defendants attempted, or

10. See R. 2491-2492, 2515, 2533-2542, 2582.

agreed to attempt, to monopolize any geographic market for any product. The only intent which the Government sought to prove was an intent to secure the City Lines business. On the other hand, defendants offered extensive evidence of the legitimate business reasons which they had for entering into the investment and supply contracts. This evidence was consistently objected to by the Government and in the main was excluded.

The court instructed the jury that Count II charged an agreement to monopolize that part of interstate commerce consisting of sales of petroleum products, motor buses and tires to the City Lines (R. 1176). The instructions also clearly stated that a guilty verdict could not be returned unless the jury found that the defendants had a "specific intent" to accomplish a forbidden restraint (R. 1176-1177).

After verdict of guilty on Count II, defendants preserved the errors relied on here by motions in arrest of judgment and for new trial (R. 2596-2620). The trial court overruled all such motions, stating, with respect to the *Columbia Steel* and *Yellow Cab* cases, that at least in his mind, "there is some confusion as to the state of the law" (R. 1190-1191).

**Opinion of the Court of Appeals.**

The Court of Appeals affirmed the judgment of the trial court, but it did so in an opinion which only served to compound the already existing confusion. The opinion is predicated upon theories which are both at variance with contentions made by the Government and with the construction of the law embodied in the instructions of the trial court.

On the question of what constituted a "part of commerce", as that term is used in Section 2 of the Sherman Act, the defendants contended, as they do here, that the

alleged conspiracy to monopolize sales to the City Lines could not violate Section 2 of the Act because it did not involve the monopolization of any geographic market. The Government contended that the purchases of the City Lines constituted a "market" and a "part" of commerce within the meaning of the Act, even though they had no geographical significance. The Government did not argue that the indictment alleged or that an attempt had been made in the trial of the case to prove a plan to monopolize a geographic market. On the contrary, the Government went so far as to state in the brief filed by it in the Court of Appeals, that to contend that Section 2 of the Sherman Act applied only to geographic markets (Br. 29) would "amount to an attempt to truncate the Sherman Act".

The Court of Appeals presumably disagreed with the Government's position and agreed with defendants that the "part" of commerce referred to in Section 2 must have geographic significance, for in its opinion the Court took no exception to the argument made by defendants to that effect. But the Court reached the novel conclusion that the City Lines represented a market having geographic significance because they operated transit systems in 45 cities.

On the question of what might constitute a monopolization of this City Lines "market", the Court of Appeals expressed ideas which were at direct variance with the conclusions of law reached by the trial court. Although the trial court conceived of the purchases of the City Lines as constituting a "market" which might be the subject of monopolization, that Court held that the unlawful monopolization of this "market" could not be established without proof that defendants were motivated by an illegal specific intent and that such intent could not be inferred from the mere execution of the supply and investment contracts (R. 1176, 1177). Without regard for the instruc-

tions of the trial court, the Court of Appeals affirmed the verdict of the jury on the ground that the actual reasons of the defendants for entering into these contracts were immaterial, and that such intent as might be necessary to support the verdict could be inferred from their mere execution (R. 2688, 2691).

Having concluded that the execution of these contracts inevitably led to a violation of Section 2, the Court then held that evidence of defendants' reasons for entering into these contracts was properly excluded.

**Specification of Errors to Be Urged.**

The Court of Appeals erred:

1. In holding that Count II of the indictment alleged an offense against the United States.

2. In failing to reverse the order of the trial court overruling defendants' motions in arrest of judgment.

3. In failing to reverse the order of the trial court overruling defendants' motions for a new trial.

4. In holding that the verdict is supported by the evidence.

5. In holding that the judgments are supported by the verdict.

## REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals has placed upon Section 2 of the Sherman Act an interpretation never before given to it by the federal courts. It is impossible to over-state the far-reaching effects which this decision, if permitted to stand, will have upon industry in this country.

Since 1911 it has been generally accepted that Section 2, as interpreted by the "rule of reason", applies only to the monopolization of geographic markets. In *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911), this Court stated (at p. 61):

> "The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

After quoting the above language in *Patterson* v. *United States,* 222 Fed. 599 (C. A. 6), cert. denied 238 U. S. 635 (1915), the court stated (at p. 622):

> "This excludes therefrom the interstate trade or commerce of a particular prospective purchaser of a particular commodity, and confines it to the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States or in some particular portion thereof."

The geographic and distributive formula, first announced in the *Standard Oil* case, has been reiterated in recent decisions. See, *e. g., Indiana Farmers Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268, at page 279 (1934), and *United States* v. *Yellow Cab Co.,* 332 U. S. 218, at page 228 (1947).

The statement of this formula in those two cases was specifically referred to by this Court in the recent *Standard Stations* opinion. The economic reason for the requirement that a "part" of commerce must have geographic significance was tersely stated as follows (337 U. S. at page 299):

> "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition. Cf. *Indiana Farmers Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268, 279; *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218, 226."

In every case—except this one—in which the Government has successfully maintained a Section 2 charge, it has been alleged that the defendants monopolized, conspired to monopolize, or attempted to monopolize some geographic market or markets. The court below, however, has concluded that the monopolizing of a single customer's purchases is prohibited by Section 2, provided (we assume, though this is not made explicit) that the customer makes purchases in several different cities and those purchases are substantial in dollar amount.

There is absolutely no authority for the court's conclusion. The only case which it cites is *United States* v. *Yellow Cab*, which, as will be demonstrated hereinafter, does not support the holding.

The full significance of this holding can be appreciated only by considering the effect which it would have upon specific business practices and policies which form a part of the recognized and commonplace pattern of doing business in this country.

The simplest way to consider the problem is in terms of an attempt by one supplier to monopolize a part of interstate commerce. There is, of course, no distinction under Section 2 of the Sherman Act between monopolization, an attempt by one to monopolize, or an attempt or

conspiracy by two or more to monopolize, in so far as the part of commerce which must be the subject of the monopolization or intended monopolization is concerned. That "part" of commerce which may be the subject of a conspiracy to monopolize must have the same geographic significance—no more and no less than the "part" of commerce which may be the subject of an attempt to monopolize.

Virtually every large business engaged in the nation-wide distribution of its products has stores, branch plants or other sales outlets located in numerous cities throughout the country, and purchases supplies either at or for delivery to those outlets. If a company owns a chain of stores, one of which is located in each of 45 cities, purchases for those stores seemingly have geographic significance in the same sense in which that term has been used by the Court of Appeals. Would it then constitute a violation of Section 2 of the Sherman Act for a manufacturer of raincoats, for example, to attempt to sell to such company all of the raincoats that might be handled by the company in its 45 stores? Such is the conclusion which would seem to follow from the court's holding.

A large mail order house, of course, will sell its products in thousands of towns and villages located in all of the 48 states. Its geographic coverage of the country is virtually complete. If a manufacturer of refrigerators attempts to obtain a contract under which he will supply for a specified period of time all of the refrigerators to be sold by the mail order house under its own brand name, is he, under the Sherman Act, attempting to monopolize the part of commerce which is represented by those purchases? Is a company running such a business required to purchase from several suppliers, even though it is put to additional expense in doing so, expense which will be passed on to the consuming public in higher prices?

The Tennessee Valley Authority, operating dams in vari-

ous areas, is one of many governmental agencies which makes use of requirements contracts. When the TVA invites suppliers to bid on its full requirements for a specified period of time for products to be used in the construction of several dams or other projects, is it inviting those suppliers to violate the Sherman Act? When they enter into contracts to supply such requirements are they monopolizing a part of interstate commerce?

Carried to its logical conclusion, the opinion of the Court of Appeals would prevent a seller from contracting to supply even a substantial portion of the requirements of a very large buyer. Obviously, a supplier would impose a greater degree of restraint upon his competitors if he obtained the right to supply, and therefore controlled, 50% of the requirements of a buyer whose purchases in turn represented 60% of the market in a geographic area, than would the same supplier if he controlled all of the business of a buyer whose requirements represented only 10% of the market in that same area. If the lesser of the two restraints is prohibited, what of the greater one?

Is the result of this case to be that the Sherman Act, enacted for the purpose of preserving competition, will have the effect of stifling competition? Must every seller refuse to compete for some part of the business represented by the requirements of a large buyer? The situations suggested may seem absurd but where do we stop short of them if it be the law that for a seller to attempt to obtain all or substantially all of the business of one customer, which business is substantial in volume and is distributed over some geographic area, is in and of itself an attempt to monopolize under Section 2 of the Sherman Act.

II. The decision of the Court of Appeals is predicated on a misinterpretation of this Court's decision in *United States* v. *Yellow Cab Co.*, and a failure to appreciate the clear import of the opinion in *United States* v. *Columbia*

*Steel Co.* If allowed to stand, the decision will revive the confusion which was engendered by some of the language of *Yellow Cab,* and, as thought until now, put to rest by the *Columbia Steel* opinion.

In view of the fact that the sole authority for the decision of the court below is *United States* v. *Yellow Cab Co.,* 332 U. S. 218 (1947), it is appropriate to analyze that case with care. It will first be shown that the *Yellow Cab* case involved geographic markets and also an intent to cause public injury, both of which elements are absent in this case. Next, the *Yellow Cab* opinion will be analyzed in the light of the contentions of the parties to that appeal. Finally, it will be shown that the decision of the court below, and more particularly its interpretation of *Yellow Cab,* is in conflict with this Court's holding in *United States* v. *Columbia Steel Co.,* 334 U. S. 495 (1948).

### A. The Facts of the Yellow Cab Case.

The complaint in the *Yellow Cab* case alleged in a single count that the defendants had participated in a conspiracy which violated both Sections 1 and 2 of the Sherman Act. The conspiracy was alleged to have two objectives, first, the control of the operation of taxi cabs in four large cities, and second, the control in those cities of the purchases of taxi cabs. With the first of those charges we are not here concerned. To the extent that the City Lines had a monopoly in the operation of buses in any community, it was a lawful monopoly granted by franchise. There is no contention to the contrary.

It is in connection with the second phase of the conspiracy alleged in the *Yellow Cab* complaint that the Court of Appeals feels that it finds support for its holding. The support is fancied rather than real. Upon analysis it will be found that the decision of this Court in the *Yellow Cab*

case supports the position of the defendants and not the position of the Government.

The important factual difference between the two cases has been overlooked by the Court of Appeals and is this: Only a person licensed to operate a taxi cab has reason to purchase a taxi cab. Of necessity, therefore, the control of such licenses in a city carries with it the control of taxi cab purchases made in the city. Control through a franchise of the right to operate buses in a city does not carry with it any corresponding control over citywide purchases of tires, tubes, gasoline and buses.

Obviously, the City Lines purchases of gasoline in any city represented only a very small percentage of the total amount of gasoline sold in that city. The same is true with respect to tires. The City Lines could use only a small part of the tires used in any community.

The comparison may not be quite as marked in the case of buses and it is perhaps for this reason that the Court of Appeals has mistakenly found some support for its views in the *Yellow Cab* decision. There are two things to be said in this connection. In the first place, the Government does not contend that the purchase of buses is to be viewed in any other light than are the purchases of gasoline, tires and tubes. The fact that the purchases of buses by the City Lines may have represented a greater proportion of the vehicles of that character sold in a city than the purchases of tires, tubes or gasoline by the same company represented of the total purchases of those products, is not alleged to have any significance. In the second place, the record is entirely silent as to how the purchases of buses by the City Lines compared with the total purchases of such vehicles in any geographic area, city, state or some other. In each of the 45 cities in which the City Lines operated, the purchase of buses by other users such as large industrial concerns, schools, army camps, other

common carriers, etc., may have been far larger than the purchases of buses made by the City Lines.

While the Government neither alleged nor proved the portion of total purchases of petroleum products, tires or buses represented by the City Lines purchases in any city or other area, it did specifically allege in the *Yellow Cab* complaint the percentage of cab purchases controlled by the defendants in each of four cities.[11] This Court, in its opinion, also specifically referred to the extent of such control in each city. It said:

> "It is said that the appellees have agreed to control the operation and purchase of taxicabs by the principal operating companies in Chicago, New York City, Pittsburgh and Minneapolis, insisting that they purchase their cabs exclusively from CCM. *This excludes all other manufacturers of taxicabs from 86% of the Chicago market, 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market.*" 332 U. S. at 224. (Emphasis is added in all quotations in this petition.)

In addition to the fact that the *Yellow Cab* complaint involved a plan to control geographic markets, whereas this case does not, there is a second important difference between the two cases.

In the *Yellow Cab* case, the Court was concerned not only with the extent of the control exercised in a geographic area, but also with the purpose for which that control was acquired. It was concerned not only with the question of whether any "part" of commerce was affected, but also with the question of whether there was a public injury. The Court said (p. 224-225):

> "The result allegedly is that these companies must pay more for cabs than they would otherwise pay,

11. See record in the U. S. Supreme Court, *United States* v. *Yellow Cab Co.*, No. 22, O. T. 1949, pp. 7-8.

> their other expenditures are increased unnecessarily, and the public is charged high rates for the transportation service rendered."

This statement was made in response to portions of the complaint dealing with the specific purpose and effect of the alleged conspiracy.[12]

No such issue is presented in this case. The evidence is in fact directly to the contrary. The operations of the City Lines resulted in the lowering of fares to the public and in the improvement of service. It is undisputed that the supply contracts were the most favorable which the City Lines were ever able to negotiate. The Government does not contend that the defendants intended to, that they did, or that they could control prices. The high quality of the products sold by them has not been questioned.

### B. Analysis of the Yellow Cab Opinion.

The Court of Appeals quoted from three separate paragraphs in the *Yellow Cab* opinion. They will be considered in the order in which they appeared in this Court's opinion.

#### 1. The Commerce Argument.

The *Yellow Cab* complaint alleged that the conspiracy restrained sales of taxicabs by manufacturers other than the defendant, but did not allege the location of such manufacturers, and, as defendants argued, "indeed no allegation is contained anywhere in the complaint that such sales of the other manufacturers are interstate."[13] In brief, it was argued that the pleading did not sufficiently

12. See Record in the U. S. Supreme Court, *United States* v. *Yellow Cab Co.*, No. 22 O. T. 1949, pp. 13-14, 15, 16, 18-19. Cf. also dissenting opinion on the second appeal, 338 U. S. at p. 344.

13. Br. for appellees, No. 1035, O. T. 1946, pp. 9-11.

allege the effect on interstate commerce necessary to justify the applicability of the Sherman Act, or, for that matter, of any other Federal statute enacted under the commerce power.

The Court disposed of this argument in two paragraphs, 332 U. S. at 225-226, the second of which was quoted in part by the court below (R. 2682). In the first of these paragraphs this Court stated that the commerce which was allegedly restrained "has a character that is undeniably interstate." In the second, the Court pointed out that an appreciable amount of commerce was involved, and hence the alleged conspiracy was within the reach of Federal power.

Petitioners understand the "appreciable segment" test as laid down in that paragraph to be a test of coverage, not of violation, of the Act. In effect, the Court stated that if a violation is otherwise shown, Section 1 of the Sherman Act applies "regardless of the amount of [interstate] commerce affected, and Section 2 applies to the monopolization of 'any part' of interstate commerce without specifying how large a part must be affected."

Petitioners' interpretation of this paragraph is confirmed, not only by the fact that the Court was dealing with the defendants' commerce argument, but also by its citation, at this point, of *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, note 59, p. 225 (1940), and *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485 (1940). In the cited paragraph of the *Apex* opinion, which in turn refers to the *Socony Vacuum* footnote, the Court was considering whether "the acts of respondents by which the restriction was effected [were] *within the reach of the commerce power if Congress had seen fit to exercise it.*" See 310 U. S. at 484-485.

Despite what seems to petitioners to be the clear mean-

ing of this paragraph of the *Yellow Cab* opinion when read in context, the court below apparently understood it to mean that all the elements of a Section 2 violation are present if an exclusive dealing arrangement gives a seller control of an appreciable segment of commerce. As is pointed out hereinafter, that interpretation is squarely "at odds" with this Court's holding in *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948).

**2. The Geographic Market Argument.**

The second argument answered by the Court in the *Yellow Cab* opinion was the argument that the complaint was defective because it did not allege that defendants had a monopoly of the nationwide market for cabs.[14] It is important to note the difference between this argument and petitioners' contention in the instant case. Here it is contended that the indictment is defective because there is no charge that *any* geographic market was monopolized, whereas in *Yellow Cab* it was contended that the complaint alleged monopolization of the *wrong* geographic market.

The Government summarized its answer to this argument in words which adopt the interpretation of Section 2 relied on by petitioners here. In its summary of argument, the Government stated:

> "The facts alleged also show a monopolization of a 'part' of interstate commerce within the meaning of Section 2 of the Act. To engross, as to any commodity, interstate trade with those *within a particular area* violates both Sections 1 and 2 of the Act." (Br. for the United States, *United States* v. *Yellow Cab Company*, No. 1035, O. T. 1946, at pp. 20-21.)

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14. The Yellow Cab defendants argued:

"The volume of 'interstate' sales must, from the manufacturers' standpoint, be viewed nationally since their sales are national. The operating companies' exclusive purchases from CCM are negligible in comparison with the total national sales of all manufacturers, * * *." (Brief for Appellees, No. 1035, O. T. 1946, p. 13.)

This Court adopted the Government's position, and disposed of appellees' argument in a paragraph which is quoted by the court below (R. 2683). (See 332 U. S. 218, at 226.) In that paragraph the Court merely held that the Sherman Act proscribes the monopolization of geographic markets less than nationwide in scope.

This is made clear in the *Columbia Steel* opinion where the Court quoted in full the paragraph from the *Yellow Cab* opinion under discussion in order to support its conclusion that, for the purpose of that decision, an eleven-state area could be substituted for the nationwide market in determining the legality of the defendants' conduct. The Court stated (334 U. S. at pp. 519-520):

> "We first lay to one side a possible objection to measuring the injury to competition by reference to a market which is less than nation-wide in area. The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints *within that area.* In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, we sustained the validity of a complaint which alleged that the defendants had monopolized the cab operating business in four large cities.[15] *It is the volume in the area which the alleged restraints affect that is important.*"

### 3. The Restraint Argument.

The third paragraph of the opinion in the *Yellow Cab* case which is quoted by the Court of Appeals (R. 2682), is a part of this Court's discussion of the purpose and effect of the alleged conspiracy. (See 332 U. S. at 226-228.) The Court, in this paragraph, spoke of both its

15. (At this point the Court quotes in a footnote the entire paragraph from the *Yellow Cab* opinion which is quoted by the court below at R. 2683.)

effect on competitors and also its effect on controlled companies. It stated that competitors would be excluded from the part of the market represented by the controlled operating companies. The reference to the controlled companies as merely a "part of the market" is to be contrasted with the novel holding of the Court of Appeals in this case that the City Lines, in and of themselves, constitute a market.

In the footnote to the paragraph quoted by the Court of Appeals, this Court also referred to the effect which the alleged conspiracy had upon the prices paid by controlled companies for their cabs (*Id.*, p. 227). This statement is again to be contrasted with the instant case in which there is no contention that the alleged conspiracy affected prices.

The quoted paragraph, incidentally, points up one of the difficulties in interpreting the *Yellow Cab* opinion as it applies to a Section 2 case. The complaint in the *Yellow Cab* case alleged a conspiracy both to restrain and to monopolize trade. It was not necessary, therefore, for the Court, in its opinion, to distinguish between a Section 1 and a Section 2 violation. In parts of the opinion, such as this one, where the Court speaks only in terms of a restraint and cites restraint cases, it apparently was thinking in terms only of the alleged Section 1 violation.

Finally it should be noted that in the *Columbia Steel* case the Government sought to place the same interpretation upon this paragraph of the *Yellow Cab* opinion that the Court of Appeals has placed upon it in its opinion. That interpretation was flatly rejected by this Court. (See 334 U. S. at 521-522.)

### C. The Decision of the Court Below Is in Direct Conflict With This Court's Decision in United States v. Columbia Steel Co.

When suppliers enter into exclusive dealing arrangements with a customer, competition from other suppliers "is completely eliminated and the business of supplying [products to that customer] is entirely in the hands of the suppliers, in other words monopolized by them" (R. 2681). This language from the Court of Appeals opinion is applicable to all exclusive dealing arrangements unless there is some ground for differentiating the City Lines from other customers.

The Court referred several times to the fact that the City Lines operate public transit systems in forty-five cities. The fact that a customer is in the transit business is of interest to a supplier only because he probably is, therefore, a large user of the supplier's products. But there are many other large users who may be just as desirable customers as are transit systems. Also, despite the Court's suggestion that the operation of transit systems in forty-five cities gives the City Lines purchases "geographic significance," it seems perfectly clear that this fact is not significant for any reason except to indicate that the purchases are large in volume. Therefore, the only limitation on the Court's holding that exclusively dealing arrangements are illegal *per se* is the qualification that a large volume of business must be affected.

The amount of business covered by the City Lines supply contracts totaled over $37,000,000 during the ten-year period involved. In the *Columbia Steel* case, the defendants acquired exclusive and perpetual control of the purchases of a customer whose business amounted "to around $22,000,000.00 annually,"[16] an amount well over five times

16. See 334 U. S. at 527.

as large as the average annual purchases of petroleum products, tires, tubes, and buses made by all the City Lines operating companies from all the supplier defendants.

Despite the fact that the dollar volume of the business involved in the *Columbia Steel* case greatly exceeded the dollar amounts involved here, the Supreme Court there stated (334 U. S. at 520):

> "It is the volume in the area which the alleged restraints affect that is important."

Unless that volume is so large in relation to the total volume of business in the area as to unreasonably restrict the opportunities of competitors to market their products, the exclusive control is not prohibited by the Sherman Act. This is true whether the exclusive dealing arrangement is "brought about by vertical integration *or otherwise.*" The Court made this clear (at p. 524):

> "Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration *or otherwise,* are not illegal, at any rate until the effect of such control *is to unreasonably restrict* the opportunities of competitors to market their product."

The question whether exclusive dealing arrangements unreasonably restrict the opportunities of competitors to market their products obviously cannot be answered until the area in which the concerns compete has been defined. This is the economic reason for the legal requirement that the words "any part" have a geographic significance. This Court stated this point clearly (p. 527):

> "The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise. *It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in com-*

*petition in that market.* If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."

The first step in the analysis of the legality of an exclusive dealing arrangement has been entirely omitted in the instant case. No attempt was made either in the indictment or in the presentation of evidence to delimit the market in which the supplier defendants and their competitors compete. Moreover, despite this Court's clear admonition, no evidence was offered by the Government with respect "to the percentage of the business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize,[17] the probable development of the industry, consumer demands, and other characteristics of the market." The defendants made offers of proof on all of these matters, and all were excluded by the trial court.

The trial court's rulings on evidence made it impossible to determine the reasonableness of the effect of the requirements contracts on competition. These rulings were sustained by the Court of Appeals on the ground that the effect of the contracts on competition was entirely irrelevant—in other words, that they were illegal *per se*. The Court stated:

"We think the jury could not properly have found other than that the sales of all tires, buses and pe-

17. By "purpose to monopolize," petitioners understand this Court to mean "purpose to monopolize some market area".

troleum products to 46 operating companies in 45 states, aggregating many millions of dollars, constituted a substantial segment of interstate commerce and that evidence comparing this with the amount involved in the total business of the companies was wholly irrelevant. It was not a question of what percentage of the total ocmmerce in such products was but a question of whether a substantial part of commerce was monopolized."

If, as a matter of law, "a substantial part of commerce was monopolized" by contracts covering an average of less than $4,000,000 of business a year during the ten-year period involved here, why did not the Columbia Steel Company monopolize a part of commerce when it acquired exclusive and perpetual control of $22,000,000 worth of business a year?

III. The trial court properly conceived of the crime charged in Count II of the indictment as having three separate elements, to-wit:

(1) A conspiracy,

(2) A specific intent to accomplish the restraint forbidden by Section 2 of the Sherman Act, and

(3) Involvement of that part of trade and commerce referred to in Section 2 of the Act.

The trial court held as a matter of law (under a mistaken application of language appearing in the *Yellow Cab* case) that the requisite part of trade and commerce was involved. The court then submitted the case to the jury under instructions that the defendants could be held guilty only if the jury found that both of the foregoing elements (1) and (2) were also present.

Of what could or could not be considered as evidence of an intent to accomplish the restraint forbidden by Section 2 of the Act, the court had this to say:

"*A specific intent to accomplish the single over-all*

*unlawful purpose charged in the indictment cannot be inferred merely from the fact that the several investment and supply contracts were entered into between the supplier defendants and National, American or Pacific.* In order to find such a specific intent as is necessary to find the defendants, or any of them, guilty in this case, you must find that such defendants knowingly, wilfully and deliberately intended to accomplish a forbidden restraint." (R. 1177.)

In affirming, the Court of Appeals proceeded to give a different interpretation of Section 2 of the Act and then said in effect that the jury was not bound to follow the instructions of the trial court.

Of what constituted evidence of the existence of the specific intent outlawed by the Sherman Act, the Court of Appeals said (R. 2688):

> "In view of our conclusion that the indictment charges defendants with an offense cognizable under Section 2 of the Act, there would seem to be little doubt as to this issue, for the defendants do not deny the execution of the requirements contracts or that it was their intention to execute them, or that the effect of those contracts is to exclude competitors from selling buses, tires, tubes and petroleum products to the City Lines defendants."

The court also quoted as applicable, language which appeared in its opinion in the case of *United States* v. *General Motors*, 121 F. (2d) 376, where it said (R. 2690):

> "Evidence of benevolent motives or good intention is immaterial where the operation of the conspiracy and the specific acts and things done pursuant thereto, necessarily result in a direct restraint of interstate commerce."

In so holding, the Court of Appeals erred in two separate respects. In the first place, it placed an erroneous interpretation upon Section 2 of the Sherman Act. In the

second place, it sustained the verdict upon a theory at variance with that upon which the case was submitted to the jury.

Obviously, every person who attempts to obtain business from another knows that if he is successful he will remove that business from the competitive market and will to that extent restrain the opportunities of his competitors. If a specific intent to accomplish a restraint forbidden by the Sherman Act can be inferred from this conduct alone, then every person engaged in the business of buying or selling any product may be said to have such an intent. Such cannot be the law.

Petitioners are fully aware of the line of cases which hold that where the necessary and inevitable consequence of actions which have been deliberately undertaken is to restrain or monopolize trade, it is not necessary to prove that they were undertaken with that intent. This is the line of cases upon which the Court of Appeals has relied. These are not cases, however, in which the actions from which such intent has been inferred consist merely of an effort to obtain business, and the decisions are not in point.

While it is sufficient, for the purposes of this petition, to demonstrate that the Court of Appeals has erroneously interpreted provisions of the Sherman Act, it is also true that it has erred in confirming the action of the jury upon a theory other than that upon which the case was submitted to the jury. This Court has recently held that such a shift of theories in the Appellate Court is itself a substantial denial of defendants' right to a jury trial in a criminal case. In *Cole* v. *Arkansas*, 333 U. S. 196 (1948), the Court stated (p. 202):

> "To conform to due process of law petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

IV. Because of its conclusion that the intent to accomplish the restraint forbidden by Section 2 of the Sherman Act could be inferred from the execution of the requirements contracts, the Court of Appeals has also failed to appreciate the significance and importance of evidence which was excluded by the trial court. In general, this evidence tended to show or to corroborate other evidence offered by defendants to show their reasons for entering into the several investment and supply contracts. It bore directly on the question of "specific intent", which was submitted to the jury. As related to the investment contracts it would have shown that since Colonial days it has been customary in American industry for one company to finance, in whole or in part, the operations of another company with which it maintains trade relations.

As related to the supply contracts, this evidence would have shown that it had long been customary in the industries represented by these defendants and in many other industries to use contracts of this type. It would have shown the extent to which it was customary for buyers to demand them and the sound business reasons which impelled them to do so. It would have shown the extent to which contracts executed in this form gave valuable information to the seller in his business which could not be obtained from spot sales of the same amount of products.

This evidence was not offered, as the Court of Appeals seemed to think, on the ground that defendants' practices, if otherwise unlawful, would be made lawful because they were pursued by others. It was offered because of the fact that legitimate business reasons which made contracts in this form attractive to either buyer or seller and accepted business customs which it would be natural for a supplier to pursue in the absence of some impelling reason to the contrary, would have a direct bearing on the question of

intent, the question of why these contracts were in the form and contained the provisions which they did. If the question of "specific intent" was an issue, this evidence was clearly admissible.

All of this evidence was objected to by the Government at the trial of the case as not material. On appeal it was urged that in any event it was merely cumulative in character. Neither contention possesses merit. No evidence could have been more helpful to the jury in its effort to determine just why the defendants made the investment and supply contracts which were criticized by the Government. And while Mr. Fitzgerald, President of National, was permitted to testify why these contracts were advantageous to his company, it was the supplier defendants rather than the City Lines defendants who, according to the Government, improperly benefited from these arrangements. It was their motives which were primarily the subject of the jury's inquiry into the question of intent, and these defendants, particularly in a criminal case, were entitled to present all evidence which had a proper bearing upon this subject.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 589

NATIONAL CITY LINES, INC.; PACIFIC CITY LINES, INC.; FIRESTONE TIRE & RUBBER COMPANY, AND L. R. JACKSON; GENERAL MOTORS CORPORATION, AND H. C. GROSSMAN; PHILLIPS PETROLEUM COMPANY; MACK MANUFACTURING CORPORATION; STANDARD OIL COMPANY OF CALIFORNIA; FEDERAL ENGINEERING CORPORATION; E. ROY FITZGERALD; FOSTER G. BEAMSLEY; HENRY C. JUDD, PETITIONERS

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (R. 2675) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on January 3, 1951 (R. 2693-2703), and a timely petition for rehearing was denied on January 31, 1951 (R. 2713). The petition for a writ of certiorari was filed on March 2, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether a conspiracy to enter ten-year requirements contracts covering all purchases of busses, petroleum products, tires and tubes by 46 local transit companies in 45 cities, in return for investments by the suppliers in holding companies which own or control the local companies, is a conspiracy to monopolize any part of interstate commerce within the meaning of Section 2 of the Sherman Act.

2. Whether there was any error in the exclusion of evidence by the district court.

3. Whether it was error for the court of appeals, although holding that specific intent to monopolize was not a requisite of the offense charged, to affirm judgments of conviction based upon jury verdicts of guilty where an instruction had been given that a specific intent to monopolize was required.

STATUTE INVOLVED

Section 2 of the Act of July 2, 1890, commonly known as the Sherman Act, 26 Stat. 209, 15 U.S.C. 2 provides as follows:

Sec. 2. Every person who shall monopolize,

or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

The corporate petitioners are two holding companies [1] (National City Lines, Inc. and Pacific City Lines, Inc. herein referred to as the "City Lines petitioners") which own or control a number of local transportation companies; five corporations engaged in the manufacture and sale of busses, petroleum products, tires and tubes (Firestone Tire & Rubber Company, General Motors Corporation, Phillips Petroleum Company, Mack Manufacturing Corporation and Standard Oil Company of California, herein referred to as the "supplier petitioners"); and an investment subsidiary of petitioner Standard Oil (Federal Engineering Corporation). The individual petitioners are officers of the corporate petitioners.

On April 9, 1947, petitioners were indicted in the Southern District of California on charges of

[1] Since the date of the indictment petitioner Pacific has been dissolved and its assets acquired by petitioner National (Gov. Ex. 3, R. 1207). American City Lines, originally named as a defendant in the action, had merged with petitioner National prior to the indictment and was dismissed as a defendant (R. 19).

conspiracy to restrain trade (Count I) and monopolize interstate commerce (Count II) (R. 3, 13). The case was transferred to the Northern District of Illinois and a jury trial was had. Petitioners were convicted of conspiracy to monopolize, but acquitted of the restraint of trade count (R. 2591). They were sentenced to fines ranging from $1.00, in the cases of the individual petitioners, to $5,000 in the cases of most of the corporate petitioners. The judgments of conviction were unanimously affirmed by the court of appeals (R. 2693).

I. Petitioners expressly disclaim as a reason for granting certiorari any contention that the evidence of conspiracy is insufficient (Pet. 7, note 9). Accordingly, the salient facts, and the inferences which the court below held might reasonably be drawn from those facts, may be briefly stated.

At the time of the return of the indictment the City Lines petitioners owned or controlled 46 transportation systems located in 45 cities in 16 states (R. 2677). In 1946, the supplier petitioners sold over $11,000,000 worth of busses, petroleum products, tires and tubes to the City Lines petitioners and their operating companies (*ibid.*). For the period from 1937 to May 1, 1947, total sales were over $37,000,000. The supplier petitioners have invested some $9,000,000 in the preferred stock of the City Lines petitioners, at prices in excess of the prevailing market prices, in return for ten-year contracts under which the latter have agreed to

cause their controlled operating companies to purchase all their requirements of busses, petroleum products, tires and tubes from the respective supplier petitioners (R. 2678-9; see Pet. 6). Pursuant to the requirements contracts, existing purchase contracts of the operating companies were to be terminated as quickly as possible and the operating companies were to equip themselves with the supplier petitioners' products to the exclusion of any products of their competitors (R. 2678).

The evidence of the intent of the City Lines petitioners in inducing the supplier petitioners to invest in the City Lines petitioners, and the intent of the supplier petitioners in insisting upon long-term requirements contracts in return for such investments, was characterized by the court below as follows (R. 2688):

> Of course, it may well be that defendants did not intend affirmatively to violate the law, but it seems quite evident that they did intend, by making their mutually concerted investments in City Lines' stock conditional on the execution of exclusive requirements contracts in their favor, to join forces in making investments in consideration of the several exclusive contracts and thus, by their united and concerted action, to exclude their competitors from a market composed of the City Lines defendants and their operating subsidiaries, present and future, * * *.

II. The trial court admitted considerable evidence offered by the petitioners as to their intent in engaging in the transactions here involved, and the facts and circumstances which might throw light upon that intent.[2] On the other hand the trial court rejected as collateral or cumulative some of the evidence offered for this purpose (see, *e.g.*, R. 1002). In the categories excluded were evidence purporting to show that it has been the custom in American industry generally, and in the specific industries here involved, for suppliers to insist upon financing their customers (*e.g.*, R. 2550, 2572), and evidence of the total demand in various geographical areas for the products sold to the City Lines petitioners (*e.g.*, R. 2491, 2515, 2533).

ARGUMENT

1. Petitioners argue that there has been a failure to allege or prove conspiracy to monopolize in any defined geographical area. The premise upon which this argument is based is unsound. The petitioners have been convicted of conspiracy to monopolize the business of supplying all of the commodities of certain classes required by the local transportation systems in some 45 cities, and those local transportation systems are themselves natural monopolies (see Defendants' Requested Instruction 11, R. 2567). The conspiracy excluded all competitors of the supplier petitioners from this defined and by no means inappreciable market.

[2] See opinion of the court below (R. 2690-1); R. 501-504, 944-1005.

Accordingly, as the court below held (R. 2681), the conspiracy to monopolize here charged and proved had geographic significance. In any event, however, Section 2 of the Sherman Act prohibits the monopolization of "any part" of interstate commerce, and is not limited to parts described geographically. In *Standard Oil Co.* v. *United States,* 221 U.S. 1, 61, this term was held to have "both a geographical and a distributive significance" in that it includes "any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce." And see *Indiana Farmer's Guide* v. *Prairie Farmer Co.,* 293 U.S. 268, 279.

Petitioners suggest that the court below "has placed upon Section 2 of the Sherman Act an interpretation never before given to it by the federal courts" (Pet. 13). But in *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225-226, this Court said that

> § 2 of the Act makes it unlawful to conspire to monopolize "any part" of interstate commerce, *without specifying how large a part must be affected.* Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. The complaint in this case deals with interstate purchases of replacements of some 5,000 licensed taxicabs in four cities. That is an appreciable amount of commerce under any standard.[3] [Emphasis supplied.]

[3] And see *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 173.

The court below correctly held that this holding is dispositive of the principal question in the case at bar (R. 2682-3). Obviously the commerce here involved is also appreciable whether the purchases of $37,000,000 during the ten-year period ending in 1947, or the $11,000,000 of purchases in 1946, be considered. Petitioners seek to distinguish the *Yellow Cab* case on the ground that the quoted language was intended to refer to the minimum amount of interstate commerce necessary to bring activity within the reach of federal power, *i.e.*, that the "appreciable segment" test is a test of coverage, rather than violation, of the Act (Pet. 21). But a reading of the Court's entire opinion does not support this contention. It is true that the Court stated the percentages of the taxicab market in the various cities involved which were allegedly controlled by the appellees in the *Yellow Cab* case (332 U.S. at 224), but it did not rely upon these percentages in concluding that the complaint adequately charged monopolization of interstate commerce.

Petitioners urge as a further ground of distinction (Pet. 18) that the *Yellow Cab* case involved a monopolization of the market in taxicabs, which are purchased only by taxicab companies, while the conspiracy to monopolize in the instant case involves busses and other products which are widely used by persons other than transit companies. But the monopolization charged in the *Yellow Cab* case related to *motor vehicles* used as taxicabs (332

U.S. at 220) and there was no contention that the market for motor vehicles was being monopolized, even in the four cities involved.

The automobile company competitors of the manufacturer involved in the *Yellow Cab* case were not excluded completely from selling in any geographic area, but only from selling automobiles for a particular use in certain areas. It was sufficient for purposes of Section 2 that control had been unlawfully acquired of the purchases of companies doing a substantial portion of a particular kind of business in particular areas, with the result that would-be competitors for that business were deprived of all opportunity to compete for it. By the same token competitors for the business of the local transit companies involved in the present case have been systematically excluded from the opportunity to compete.[4] The "existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power." *United States* v. *Griffith*, 334 U.S. 100, 107; see *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811, 814.

*United States* v. *Columbia Steel Co.*, 334 U.S.

[4] The *Yellow Cab* case involved the monopolization of the market in motor vehicles for use as taxicabs by taxicab companies operating a substantial proportion of the cabs in four cities. The instant case involves the monopolization of the market in busses, petroleum products, tires and tubes used by the local transportation companies in 45 cities. It can hardly be argued that there was an adequate charge of monopolization in the *Yellow Cab* case but an inadequate one here.

495, does not purport to modify or throw doubt on the decision in the *Yellow Cab* case,[5] and has no bearing here (cf. Pet. 25). In the *Columbia Steel* case it was held that under the circumstances there involved acquisition by United States Steel Corporation of the assets of Consolidated Steel Corporation, a steel fabricator located in California, constituted permissible vertical integration. In the present case there is no vertical integration. The supplier petitioners have not gone into the business of local transit and have not undertaken to "integrate" that business with their own manufacturing activities. Their "dominating power" over the local transit companies' purchases "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." *United States* v. *Reading Co.*, 253 U.S. 26, 57.[6] The supplier petitioners have simply paid for and acquired, through the medium of stock investments, a market free from competition.

The effect of petitioners' conspiracy is to eliminate all play of competitive forces with respect to the sale of certain products to the operating companies controlled by the City Lines petitioners. In

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[5] The Court in the *Columbia Steel* case specifically approved the holding of the *Yellow Cab* case in the factual setting there involved. 334 U.S. at 522.

[6] This language was quoted with approval in *United States* v. *Yellow Cab Co.*, *supra*, at 227-228, and in *United States* v. *Columbia Steel Co.*, *supra*, at 523.

the situation which was before the Court in the *Columbia Steel* case, sale of rolled steel to Consolidated Steel was removed from the field of competition by the acquisition of Consolidated, but rolled steel constituted the raw material used by the Consolidated plant, and the finished product produced by that plant had to be marketed in competition with the products of many other concerns. Here, the monopolies of the local transit companies, resting on franchise (see Pet. 18), are subject to no comparable competition. Higher prices paid for equipment or supplies resulting from being compelled to purchase in a captive market can be passed on to the public in the form of higher rates or inferior service.

Nor is this a case involving the monopolization of the purchases of a single customer. The 46 companies owned or controlled by the City Lines petitioners have been maintained as separate entities and cannot escape the consequences of violation of the Sherman Act by disregarding the corporate fiction when it is to their interest to do so. Cf. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211.[7] And this is not like the case of a

[7] Even if the City Lines petitioners were to be regarded as a single customer the character of the monopolization involved in unfairly preempting their business would not be altered. Monopolization of the purchases of a single large customer (the United States) has been held violative of the Sherman Act. *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn.). This is not to say that every time the business of a single customer is preempted unlawfully, monopolization results, but where the customer whose busi-

single manufacturer seeking to become the sole supplier of a large chain organization (cf. Pet. 15). Here a group of suppliers have combined with each other and with the City Lines petitioners to carve out a safe haven from competition.

2. Petitioners contend that the trial court improperly excluded evidence which would have showed that legitimate business reasons, rather than an intent to monopolize, impelled them to enter the arrangements under which the City Lines petitioners dealt exclusively with the supplier petitioners (Pet. 31-32). As the court below correctly held, however, specific intent in the sense of an intent to violate the law is not an essential ingredient of an offense under the Sherman Act (R. 2688).

It is settled that under the antitrust laws a person is responsible for the necessary and probable consequences of the acts which he intentionally performs. *United States* v. *Patten*, 226 U.S. 525, 543; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 173.[8] In the present case there can be

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ness is preempted is a monopoly or a quasi-monopoly, the exclusion of competitors from any opportunity to compete for its business is clearly monopolization. If a local transit company has a monopoly in a particular city, the exclusion of competitors for its business is by definition the exclusion of competition for all the local transit business in that city. See *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 766 (C.A. 6).

[8] Accord: *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 49; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275; *United States* v. *Griffith*, 334 U.S. 100, 105-106; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 406 (C.A. 7), certiorari denied, 314 U.S. 618; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C.A. 2).

no doubt that there was intent to perform the acts which resulted in monopolization of the City Lines' purchases. As Judge Lindley said for the court below, "the defendants do not deny the execution of the requirements contracts or that it was their intention to execute them, or that the effect of those contracts is to exclude competitors from selling buses, tires, tubes and petroleum products to the City Lines defendants" (R. 2688). And he concluded that even though petitioners may not have affirmatively intended to violate the law, "it seems quite evident" that they did intend "to join forces in making investments in consideration of the several exclusive contracts and thus, by their united and concerted action, to exclude their competitors from a market" (*ibid.*). We submit that no more "specific intent is required.[9]

Even if the motives of petitioners in engaging in the conspiracy had been relevant, the trial court's exclusion of evidence would not have been error. The proffered evidence as to intent was largely cumulative. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230. As the court below pointed out, "Obviously defendants were entitled

[9] Where the results achieved are not themselves unlawful, the specific purpose or intent may be relevant. See, *e.g.*, the vertical integration cases such as *United States* v. *Yellow Cab Co.*, 332 U.S. 218; *United States* v. *Columbia Steel Co.*, 334 U.S. 495. But where monopolization has been achieved, a showing of specific intent is unnecessary, "for no monopolist monopolizes unconscious of what he is doing". *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C.A. 2), quoted with approval, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 814.

to offer evidence as to their intent and motives and this they were permitted to do. They supplied testimony at some length as to their reasons, purposes and motives in entering into the transactions covered by the charge and to prove that the various sales and investment contracts were for the best business interests of City Lines and their operating companies as well as those of the suppliers. * * * Indeed, defendants admit that they were permitted to give their individual reasons for making the investment and requirements contracts but insist that they were too narrowly limited in the scope of such testimony" (R. 2690-1; see, *e.g.*, R. 501-504, 944-1005).

It is equally clear that the trial court properly excluded collateral evidence bearing upon the customs in the industry. The activities of third parties cannot justify violations of law by the defendants who are charged in a particular case. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150. "That others engaged in the same practices as the defendants certainly would not exonerate the defendants or tend to disprove their guilt." *United States* v. *New York Great Atlantic & Pacific Tea Company*, 173 F. 2d 79, 89 (C.A. 7). And see *United States* v. *General Motors Corp.*, 121 F. 2d 376, 406 (C.A. 7), certiorari denied, 314 U.S. 618.

3. Petitioners cite *Cole* v. *Arkansas*, 333 U.S. 196, for the proposition that there was a fatal variance between the instruction of the trial court with

respect to specific intent and the view of the case entertained by the court of appeals. But that case is not authority for petitioners' contention. The defendants there had been convicted under one section of a statute and their conviction upheld by a state appellate court under a different section of the statute. This Court, in reversing the conviction, stated, "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made" (333 U.S. at 201). Plainly, the holding of the Cole case is inapposite here; petitioners have been convicted of the charges upon which they were tried.

If a specific intent were required in this class of case, the instructions of the district court (see instruction quoted (Pet. 28-29, R. 1177) would have fully satisfied such requirement. On the other hand, if, as the court below held, no specific intent is required, the trial court's error in instructing the jury that such an intent was an essential ingredient of the crime charged was obviously not prejudicial to petitioners. A litigant can hardly be heard to complain of an erroneous instruction in his favor.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below was correct, there is no conflict, and the petition for a writ of certiorari should be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

## No. 589

NATIONAL CITY LINES, INC., ET AL.,
*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF.

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## REPLY BRIEF.

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This reply brief will be confined to a discussion of Part I of the Government's argument. (Br. pp. 6-12.)

Petitioners take the position that Section 2 of the Sherman Act does not prohibit an exclusive dealing arrangement with a single customer unless it gives the seller a monopoly share of the business in some geographic market. The Government makes several answers to this argument:

1. First, it suggests that the fact that the City Lines operate in 45 cities gives their purchases geographic significance. But the term "geographic significance" as used in the Section 2 cases has reference to the competitive area in

which the products involved are sold.[1] Petitioners did not control the sales of any product in any such area.

Later the Government suggests that in any event the City Lines represented 46 customers instead of a single customer. But it is entirely immaterial whether the purchases are by one customer or by 46 customers as long as those purchases do not constitute a monopoly share of the total in the area, whether the relevant area be considered the individual cities, or the nationwide market of which the 45 cities form a part.

2. After briefly suggesting that the City Lines purchases have geographic significance, the Government intimates that "in any event" the purchases have distributive significance. (Br. p. 7.) The "distributive" part of the familiar formula makes the statute applicable to "any one of the classes of things forming a part of interstate commerce."[2] Thus, since taxicabs are a physically different class of things from other motor vehicles, the statute prohibits the monopolization of this separate identifiable product.[3] But

[1] This Court has recently cited the statement of the geographic and distributive formula made in *Indiana Farmers Guide* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268 at p. 279, and repeated in *United States* v. *Yellow Cab Co.*, 332 U. S. 218 at p. 226, in support of the following proposition:

> "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." *Standard Oil Co. of Cal.* v. *United States*, 337 U. S. 293 at p. 299.

[2] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 61.

[3] The Government suggests that the product involved in the *Yellow Cab* case was *motor vehicles*, and that the alleged monopoly related only to sales for one particular use of this supposedly homogeneous product. The Court's opinion belies the suggestion. The Court repeatedly identified the product involved as "*taxicabs*." Thus the Court stated that the defendant CCM "was engaged in the business of manufacturing *taxicabs*" (p. 221); that the alleged conspiracy concerned the "purchase of *taxicabs*" in four cities (p. 224); and that the "entire amount" of the type of commerce involved consisted of "the total number of taxicabs manufactured and sold in the United States." (p. 226.)

gasoline is gasoline. Unless the record affords some reason for segregating City Lines purchases of gasoline, tires or busses from purchases of the same products by other users in the same area of effective competition, there is absolutely no basis for contending that some sales may be arbitrarily designated "a different class of things" than other sales of precisely the same products.

3. The Government's principal contention, however, is that a requirements contract effects an illegal monopolization, if the buyer's business is a natural monopoly. This contention is no more than a play on the word "monopoly." It confuses the local transit business with the business which the indictment charges was monopolized, *i. e.*, the business of selling gasoline, tires and busses. Thus the Government's contention completely ignores the effect of the supply contracts on competing sellers.

Moreover, nothing is said about either the actual or the intended effect on the buyer or on the ultimate customers of the buyer; nothing could appropriately be said on this score because no question of injury to the City Lines or to City Lines customers is here involved. Instead, it is merely suggested that a seller who has a requirements contract with such a buyer may have the opportunity to charge excessive prices which the buyer may in turn have the opportunity to pass on to the public[4]

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[4] The Government's argument provides an interesting contrast to the position taken by Government counsel at the trial. In objecting to testimony that the City Lines were able to reduce fares from 10c to 5c after taking over a local transit company, counsel stated:

> "* * * I don't think it relates to the issues in this indictment. I think Counsel should begin to relate this line of inquiry to the issues that pertain to this indictment." (R. 444.)

A similar objection was made with respect to evidence of the improved services rendered by local transit companies after acquisition by the City Lines. (See R. 465.)

Petitioners were allowed to prove that the City Lines operations resulted in substantial public benefit, through both lower fares and improved services, only because of the latitude allowed by the court to the individual defendants in a criminal trial. (See R. 445.)

Since the Government is relying on the mere possibility of public injury in a case where the record discloses that there was in fact substantial public benefit in the form of reduced fares and improved services, it necessarily follows that the Government is taking the position that it is illegal *per se* to enter into a requirements contract with a natural monopoly. The public is already protected by local regulatory agencies from any possibility of such injury.

The monopoly section of the Sherman Act is intended to prevent a seller from unlawfully obtaining control of the market for any product in any area of effective competition. The fact that a particular customer in such a market may own a patent, a transit system, or has some other monopoly or "quasi-monopoly" of the business in which he is engaged has nothing whatsoever to do with the question of whether a seller has monopolized a market in which an infinite number of other customers are assumed to exist. The seller has not monopolized within Section 2 unless he has achieved a degree of control which unreasonably limits the opportunities of other sellers to market their products in the area of effective competition.

4. The Government seeks to distinguish the *Columbia Steel* case on the ground that it involved vertical integration, whereas this case does not. (Br. p. 10.) The Government itself points out that the *Yellow Cab* case, which it contends is controlling here, is also a vertical integration case. (See Br. p. 13, n. 9.) The distinction is unsound. The *Columbia Steel* holding is expressly applicable to exclusive dealing arrangements whether "brought about by vertical integration, *or otherwise.*" (See 334 U. S. at 524.)

5. The Government seems to place some reliance on the frequently quoted "specific intent" language from the

*Reading* opinion.[5] (Br. p. 10.) Such reliance is inconsistent with the position of the Government that petitioners' "specific" intent is immaterial. (Br. pp. 12-13.)

The Government is not contending that there is any evidence of illegal "specific intent" in this case. If such intent is essential, the judgments must be reversed because the Government has in effect conceded that the evidence does not support the verdict on the theory on which the case was submitted to the jury, and also because the Court of Appeals did not review the evidence on this issue.[6]

## Conclusion.

The other contentions made by the Government have been adequately discussed in the petition for certiorari. It is important to note, however, that the Government's entire argument points up both the novelty and the importance of the questions presented by the petition. Certiorari should be granted.

Respectfully submitted,

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[5] *United States* v. *Reading Co.*, 253 U. S. 26, 57.

[6] It should be noted that petitioners' contention with respect to the shift of theories in the Court of Appeals is directed at error committed by that Court; contrary to the Government's suggestion, petitioners are not complaining of the instructions of the trial court.